

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

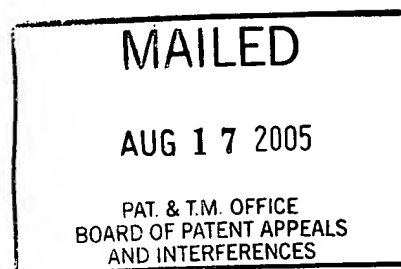
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PHILLIP JOHN BLACK

Appeal No. 2005-1972
Application No. 09/842,028

ON BRIEF



Before GARRIS, KRATZ, and JEFFREY T. SMITH, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1-4 and 7-19.

The subject matter on appeal relates to a split grip control lever. With reference to the appellant's drawing, the control lever 10 comprises a fixed base portion 12 which is intended to be fixedly secured to a machine frame and a movable upper portion

16 which is separately pivotable relative to the fixed base portion, wherein the fixed base portion provides support for an operator to resist the effects of external movements resulting from movement of the machine. This appealed subject matter is adequately illustrated by independent claims 1 and 14 which read as follows:

1. A split grip control lever comprising:

a fixed base portion; and

a movable upper portion that is separately pivotable relative to the fixed base portion, wherein the movable upper portion and the fixed base portion define a substantially continuous profile, and wherein the movable upper portion and the fixed base portion define means for an operator to resist effects of external forces via one hand while maintaining control of the movable upper portion with said one hand.

14. A machine comprising:

a machine frame supporting at least one movable element; and

a control lever secured to the machine frame, the control lever comprising:

a fixed base portion fixedly secured to the machine frame, the fixed base portion providing support for an operator to resist effects of external movements resulting from movement of the machine, and

a movable upper portion that is separately pivotable relative to the fixed base portion for controlling movement of the at least one movable element, wherein the movable upper portion and the fixed base portion define a substantially continuous profile.

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The references set forth below are relied upon by the examiner in the section 102 rejections before us:

Ditzig	5,350,891	Sep. 27, 1994
Fournier	5,577,417	Nov. 26, 1996
Evert et al. (Evert)	6,152,676	Nov. 28, 2000

Claims 1-4, 7-13, 18 and 19 are rejected under 35 U.S.C. § 102(b) as being anticipated by Fournier.

Claim 14 is rejected under 35 U.S.C. § 102(e) as being anticipated by Evert.

Finally, claims 14-17 are rejected under 35 U.S.C. § 102(b) as being anticipated by Ditzig.

As indicated on page 4 of the brief, the independent claims on appeal have been separately grouped and argued by the appellant. Because the appealed dependent claims have not been separately grouped and argued, they will stand or fall with their parent independent claims. See former regulation 37 CFR § 1.192(c)(7)(2002) and current regulation 37 CFR § 41.37(c)(1)(vii)(September 13, 2004).

For a complete exposition of the opposing viewpoints expressed by the appellant and the examiner concerning these rejections, we refer to the brief filed May 5, 2003 as well as the reply brief filed August 18, 2003 and to the answer mailed November 16, 2004 (which supercedes the June 16, 2003 answer) as

well as to the final Office action mailed December 3, 2002 (which is referred to on page 3 of the aforementioned answer).

OPINION

For the reasons expressed by the examiner and below, we will sustain each of the rejections before us on this appeal.

The section 102 rejection based on Fournier

Fournier discloses a control member designed for actuation by the hand of a human operator so as to control a real or virtual slave system (e.g., see the Abstract and lines 7-10 in column 1). With reference to patentee's drawing, the control member or handle 10 comprises an active part 12 and an information return part 14 that are interconnected via a flexible ring 19 (e.g., see lines 53-67 in column 3). According to the examiner, part 14 satisfies the movable upper portion and the control portion requirements of appealed independent claims 1 and 10, and part 12 satisfies the fixed base and resisting means requirements of these claims.

The appellant argues that Fournier's part 12 does not satisfy his claimed requirements for a fixed base portion which, along with the movable upper or control portion, define means for an operator to resist effects of external forces via one hand while maintaining control of the movable upper portion with the

said one hand. In this regard, the appellant concedes that patentee's part 12 is "fixed" as this term is broadly defined by a dictionary. It is the appellant's position, however, that the claimed term "fixed," when reasonably interpreted consistent with the subject specification, should be considered as meaning "immovable to an extent to aid the operator in effectively resisting forces caused by movement of the machine" (brief, page 6).

We agree with the examiner that Fournier's part 12 satisfies the fixed base portion and resisting means requirements of independent claims 1 and 10 even though part 12 is connected to the system being controlled via, for example, flexible cord 22 (or articulated arm 52). As clarification, we point out that patentee's flexible cord, when pulled taut, would render part 12 fixed or immovable in the direction of the pulling force. This interpretation of the appellant's claimed terms, although broad, is reasonable and consistent with the appellant's specification. See In re Hyatt, 211 F.2d 1367, 1372, 54 USPQ2d 1664, 1667-68 (Fed. Cir. 1998). The more narrow interpretation urged by the appellant would require a fixed base portion and a means that would enable an operator to resist effects of all external forces and thereby would inappropriately read limitations from the

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specification into the claims. See Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1571, 7 USPQ2d 1057, 1064 (Fed. Cir.), cert. denied, 488 U.S. 892 (1988).

In addition, it is appropriate to emphasize that the above discussed functions of the here claimed fixed base portion and resisting means are actually manifested only when the appellant's control lever is physically combined with the frame of a machine (e.g., as in appealed independent claim 14 which is not involved with the rejection under review). Significantly, appealed independent claims 1 and 10 are drawn to the control lever, per se, rather than to the aforementioned combination of a control lever secured to a machine frame. For this reason, the functional recitations in claims 1 and 10 (i.e., that the base portion be "fixed" and that the base and upper portions "define means for an operator [i.e., of the unclaimed machinery] to resist effects of external forces . . .") relate to the functional capability of the here claimed structure. See In re Schreiber, 128 F.3d 1473, 1477-78, 44 USPQ2d 1429, 1431-32 (Fed. Cir. 1997).

From our perspective, Fournier's part 12 possesses the capability of performing the fixed and resisting functions claimed by the appellant. This is evinced, for example, by

patentee's Figure 3, which shows a means for connecting part 12 to cord 22 that likewise would be capable of connecting part 12 to a machine frame. Also evincing this functional capability is the disclosure at lines 25-32 in column 6 wherein Fournier teaches that support 20 and flexible cord 22 can be eliminated whereby handle 10 directly controls patentee's system. Because the control lever structure of the Fournier patent inherently possesses the functional capability of the control lever structure defined by claims 1 and 10, these claims are prima facie anticipated by the patent. Schreiber, id.

In light of the foregoing and for the reasons expressed by the examiner, we determine that the examiner has established a prima facie case of anticipation which the appellant has failed to successfully rebut with argument or evidence to the contrary. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). We hereby sustain, therefore, the examiner's section 102 rejection of claims 1-4, 7-13, 18 and 19 as being anticipated by Fournier.

The section 102 rejection based on Evert

Evert discloses a control lever for an industrial truck which is pivotally mounted thereto at axis 12 (e.g., see the Abstract, the drawing and the paragraph bridging columns 3 and

4). Notwithstanding the aforementioned pivotable mounting, the examiner considers patentee's truck having a control lever pivotally mounted to the truck frame as satisfying the appealed independent claim 14 requirement for a machine comprising a control lever secured to the machine frame via a fixed base portion which provides support for an operator to resist effects of external movements.

In support of his contrary view, the appellant again argues that, in light of the subject specification disclosure, "those of ordinary skill in the art would readily understand 'fixed' in the context of the present invention to mean immovable to an extent to aid the operator in effectively resisting forces caused by movement of the machine" (brief, page 9). With respect to this argument, the appellant emphasizes that pivotable control levers are described as inadequate in the paragraph bridging pages 1 and 2 of his specification.

For reasons analogous to those set forth above, this argument is unpersuasive because it is premised upon an inappropriately narrow interpretation of claim 14 as requiring the capability to resist effects of all external movements and thereby improperly reads limitations from the specification into the claim. Constant v. Advanced Micro-Devices, Inc., 848 F.2d at

1571, 7 USPQ2d at 1064. Because the base portion of Evert's control lever, though pivotable, is fixed to his truck frame at axis 12 and thereby provides resistance to external movements which are away from this axis (e.g., movements which are orthogonal to the pivoting movement about axis 12), claim 14 is anticipated by the Evert reference.

It follows that we hereby sustain the examiner's section 102 rejection of claim 14 as being anticipated by Evert.

The section 102 rejection based on Ditzig

The Ditzig patent discloses a control switch or lever comprising a lower housing portion 12, upper section 16, housing 116, wobble stick 120 and knob 122 by which to remotely adjust the outside mirrors of a vehicle (e.g. see the Abstract, lines 6-15 in column 1, Figure 1 of the drawing and the specification disclosure relating to this figure).

For the reasons detailed by the examiner, we share his finding that patentee's control switch or lever in combination with the vehicle to which it is attached satisfies the requirements of appealed claim 14. We have fully considered the appellant's opposing viewpoint. Nevertheless, we agree with the examiner that the fixed base portion of patentee's structure (e.g., see housing 116) would necessarily and inherently provide

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"support for an operator to resist effects of external movements resulting from movement of the machine" as required by this claim. Similarly, it is our perception that Figure 1 of Ditzig shows the fixed base portion (again see housing 116) and a movable upper portion (see wobble stick 120 and knob 122) as defining "a substantially continuous profile" as required by claim 14.

We also hereby sustain, therefore, the examiner's section 102 rejection of claims 14-17 as being anticipated by Ditzig.


Summary

The decision of the examiner is affirmed.

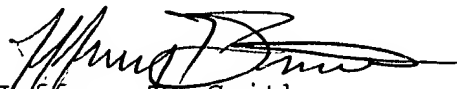
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No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a).

AFFIRMED


Bradley R. Garris
Administrative Patent Judge


Peter F. Kratz
Administrative Patent Judge


Jeffrey T. Smith
Administrative Patent Judge

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